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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 397

CYRIL T. FANECA, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA, NICHOLAS DE B. KATZENBACH, AND JAMES P. McSHANE,
Respondents.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I.

We have read, with great interest, the Supplemental Memorandum for the Respondents as the same pertains to the recent decision of the United States Court of Appeals for the First Circuit, *i.e. Kelley* v. *Dunne,* (Nos. 6390, 6391, 6406, March 11, 1965), for this Circuit, just as did the United States District Court for the Southern District of Mississippi, recognized that which the United States Court of Appeals for the Fifth Circuit failed to, viz.:

That the claims asserted by the respondent, Cyril T. Faneca, Jr., are *for denial of constitutional rights,* not assault and battery.

II.

The Respondents, in a lame effort, seek to minimize the thrust of the *Kelley* case by stating:

1. That Mrs. Kelley's action for trespass, assault and battery, and false imprisonment, was the distinguishing feature as between the decision in the *Kelley* case and that rendered in the *Norton* and *Faneca* cases.

2. That, regardless, there is "* * * no conflict among the circuits. The factual circumstances in the instant cases are of an entirely different order from those in *Kelley.*"

For the Court to fully appreciate the complete inaccuracy of these statements, we must first view exactly what the United States Court of Appeals for the First Circuit had to say in the *Kelley* case, as shown in Respondent's Brief, 9a-10a, to-wit:

"Admittedly the recent case of Norton v. McShane, 5 Cir., 1964, 332 F.2d 855, petition for cert. pending, is contra. We are unable to follow it. Indeed, *we find ourselves unable to see why federal investigatory officers should be given absolute immunity for trespass under circumstances where, had they been state officials, they might have found themselves personally responsible under an act of Congress.* Cf. Monroe v. Pape, 1960, 365 U.S. 167. * * *

"* * * As a public official engaged in the performance of his duty it is clear that the defendant had a conditional privilege if he did not have an absolute one. *Such a privilege is a defense until 'malice' is shown, the burden being on the plaintiff. However, malice*

> *in this sense means something broader than personal ill will; it means an 'abuse' of the privilege.* * * * Entry upon private premises, without consent, on the assertion of a warrant, knowing that there is none, would seem to us a prime example of reckless indifference to the rights of the individual citizen however devoted the officer may, mistakenly, feel to what he considers his duty. * * *" (Emphasis added)

We respectfully request the attention of this Court to page 6 of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, heretofore filed with this Court, wherein the allegations set forth are identical to those in the *Kelley* case, for the allegations of the Complaint state that the Respondents did:

> "* * * willfully, intentionally and purposely deprive the Petitioner of his constitutional right to peacefully assemble under the First Amendment; did willfully, intentionally and purposely deprive and deny under the Fifth Amendment, his right not to be deprived of life and liberty without due process of law; did willfully, intentionally and purposely deprive the Petitioner of his constitutional rights under the Fourteenth Amendment to due process of law, to life, liberty, and due process of law and equal protection of the laws, by charging the Petitioner, after having been pleaded and begged by the Petitioner not to do so, did willfully, intentionally and purposely fire at, or upon the Petitioner certain tear gas and/or other type of gas projectiles, to intentionally, willfully and purposely deny the Petitioner's constitutional rights heretofore set forth."

Though these be naked allegations, the record of facts in this cause before the United States Court of Appeals for the Fifth Circuit fully substantiate a cause of action as the Court had before it the Government's deposition of the Petitioner, Cyril T. Faneca, Jr., Colonel Birdsong, and the Petitioner's deposition of James P. McShane.

The facts as shown through the depositions of Colonel T. B. Birdsong, Commissioner of Public Safety, Jackson, Mississippi, Cyril T. Faneca, Jr., and James P. McShane, clearly established that on September 30, 1962 Cox's federal contingent[1] of nervous, unseasoned, and untrained personnel (Birdsong's deposition, page 73) with no plans (McShane's deposition, page 37—Birdsong's deposition, page 27) were led onto the Campus by two-time loser McShane[2] and surrounded the Lyceum Building for the sole purposes of physical occupation of the campus, but for no purpose or plans of preventing or voiding any incident (McShane's deposition, pages 66-68), when the federal authorities knew that Meredith would not come to the Lyceum Building. The occupation took place at 4:00 P.M. on Sunday, September 30, 1962.

These depositions further show that at the time of the occupation, there was no demonstration or violence upon the campus (McShane's deposition, page 35—Birdsong's deposition, page 31) since, however, there is a sharp conflict between McShane's assertion, on the one hand, that there was violence subsequent to 6:00 P.M. on September

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1. The words "Federal Contingent" are supplied by Respondent's Brief on page 5, before United States Court of App. for the 5th Cir.

2. McShane's deposition, pages 10 and 94. See also *Time Magazine*, Vol. LXXX, No. 14, Oct. 5, 1962, where the Magazine states: "The trouble of James McShane has made news before. In 1954, as a New York Police Detective, he was temporarily demoted for getting his picture in the papers holding an umbrella over the head of heavyweight champion Rocky Marciano (McShane was off duty at the time and Marciano was an old pal). McShane also had the misfortune as chief marshal, of being assigned to bring the late spy, Robert Soblen back to the U.S.; as the plane approached London, Soblen took advantage of McShane's absence to stab himself."

30, 1962, justifying the marshal's actions, with the testimony of Colonel Birdsong and the Appellee, Cyril T. Faneca, Jr., on the other hand, that the actions of the marshals, was unwarranted, what actually transpired should be set forth in detail.

From Colonel Birdsong's deposition, we find:

"Q. Now, at 7:00 o'clock, had the situation changed?

A. Of course the crowd was growing.

Q. Growing all the time.

A. Yes, sir.

Q. At 7:00 o'clock how big a crowd would you estimate?

A. I wouldn't attempt to estimate it.

Q. You would have no idea?

A. No, sir.

Q. A thousand?

A. I wouldn't say.

Q. You don't know. Was it a big crowd or a little crowd?

A. Big crowd.

Q. Big crowd of people. Could you tell from looking at them whether they were mostly students?

A. I couldn't tell.

Q. At that time were your men still under instructions to keep people off the campus that didn't belong there?

A. That's right, yes, sir.

Q. And do you know whether they performed that function?

A. I am sure that they did.

Q. At 7:00 o'clock did you observe any acts of violence?

A. Not that I can recall." (page 32)

* *

"Q. And to the best of your recollection, up until 7:00 o'clock there were no signs of disorder?

A. Nothing but—you know—boisterous, everybody hollering and so forth and so on." (page 34)

* * *

"Q. Now let's move on a little toward the crisis. At 7:30, a half hour later, was there any change in the composition or number in the crowd? Was it getting bigger all the time?

A. It was, yes, sir.

Q. Was it getting rougher?

A. I would say it was.

Q. What were they doing?

A. I couldn't tell you exactly, because I was in and out of the Lyceum Building, on over to the Gym at my headquarters in the Alumni Building, and out at the blocks and all over the place." (page 40)

* * *

"Q. Did you see any objects or any missiles of any kind being thrown by the crowd at the Marshals?

Mr. Cates: Clarify the time.

Mr. Eardley: Any time—then I will get the time if he saw it.

A. I did not.

Q. You saw no missiles being thrown?

A. I did not until the gas went off. Where I was, I did not." (page 41)

* * *

"Q. Was there constant shouting going on—

A. —and the buildup—the crowd was getting larger.

Q. Were they still throwing cigarettes? Did you see that?

A. I paid not too much attention to that, but I presume they were.

Q. And it is your testimony that on no occasion between 7:00 and 8:00 o'clock did you see anything thrown, other than cigarette butts?

A. I didn't, no.

Q. You did not?

A. No, sir.

Q. Did you see or were you informed of any person being injured in that period?

A. During that period?

Q. Yes.

A. I don't think so, not that I remember." (page 42)

* * *

"Q. And all this time that you were out there, you saw nothing being thrown at the marshals?

A. Where I was in the center of that line, I saw nothing, other than as I stated, a few cigarettes and some pennies and stuff like that—where I was. Now I will say that there was some sort of commotion and I don't know what down on the left end of the line. I don't know what that was.

Q. Didn't you know, Colonel, that prior to the firing of the gas seven marshals had been hurt?

A. No, sir.

Q. You didn't know that?

A. I did not." (page 48)

* * *

From Cyril T. Faneca's deposition, we find:

"Q. Did you see any hostile actions by anybody at that time toward the Federal marshals?

A. No, sir, I did not.

Q. None whatsoever?

A. That's right.

Q. There was no shouting, no cursing?

Mr. Cates: Define what you mean by 'hostile.' In other words, you are assuming this is hostile.

Q. Was there any shouting of such phrases as 'Nigger Lovers' at the marshals?

A. Not that I recall hearing.

Q. The crowd was quiet?

A. I wouldn't say quiet.

Q. They were talking and not shouting? Is that it?

A. They may have been giving a few hotty-toddies.

Q. A few what?

A. It's a school cheer.

Q. Oh, What do you call it?

A. Hotty-toddies." (page 33)

* * *

During this time it is important to note that the activities of the law enforcement agencies—the Federal and State.

From McShane's deposition, we find:

"Q. Did you or not, your personnel, assist the Highway Patrolmen in pushing back the crowd.

A. No, because they were not doing anything to push the crowd back either.

Q. Did you ever on your own attempt to push back the crowd?

A. No, sir." (page 68)

* * *

From Colonel Birdsong's deposition:

"Q. What was your plan?

A. We established block immediately at all entries to the campus. Approximately as the men arrived they were put on these blocks. When I arrived there, there were just a few men. As I told you in the beginning, they coming in there in driblets. We established those six blocks at the entrance to prevent the entry of crowds and to allow in only authorized personnel. (page 23)

Q. At that time was it your opinion that your men could control this crowd?

A. We could help, and we did help. We did everything within our power to prevent violence.

Q. Does this mean that you could help, meaning that you thought that the marshals should also help control the crowd?

A. I thought it was suggested.

Q. But they weren't controlling the crowd, were they?

Mr. Clark: Mr. Eardley, may I make one suggestion, please, sir, I would like for Colonel Birdsong to be allowed to complete his full answer before another question is asked." (page 57)

* * *

"Q. At this point, was it your opinion that the State Patrol needed the help of the marshals to control that crowd?

A. This is prior to the gas?

Q. Prior to the gas.

A. Prior to the gas going off, in my opinion, had they not shot that gas, we could have inched that crowd back to the center of the grove, which was our purpose. We were going to attempt to do that, and I believe that had they not fired the gas that we may have

been successful. We may not, but we were willing to try.

Q. You were going to make an effort.

A. We were going to make an effort. (page 58)

Q. Just before the firing, was this road which was between the marshals and the State Patrolmen clear?

A. Yes, sir.

Q. No other persons were in there?

A. As far as I could see, there was not within my line of vision." (page 52)

* * *

Colonel Birdsong established that there was no coordination between the Federal forces and the State Patrolmen, but that the Federal forces never attempted to establish any coordination or divulge any of their plans.

From Colonel Birdsong's deposition, we find:

"Q. Did he tell you that the marshals were going to arrive at the airport?

A. No, sir.

Q. What did he tell you?

A. He didn't—I knew nothing about their plans, nobody told me anything about their plans, what they were going to do, and they planned to do. The only thing he wanted to know from me was where the Lyceum Building was and how to get to the airport." (pages 81-82)

* * *

Colonel Birdsong, in addition to announcing that the State Highway Patrolmen had a plan, clearly showed that up to the point of the unwarranted firing by the United States Government personnel, had placed the plan of mov-

ing the crowd back into operation, by taking the 50 or 75 men (Birdsong's deposition, page 30) and slowly pushing the crowd back. Here is the testimony from the transcript of his deposition (Birdsong's deposition, pages 45-46):

"Q. Then what happened?

A. Then we had some men down at the Gym, in front of the Gym and some on each wing of this crowd, in addition to those men that were right in front, so we got every man that we had in that vicinity and put them between the marshals and the crowd, and shoved the crowd back, very slowly, and we had them on the sidewalk. We had them on the sidewalk and I was right behind Senator Yarbrough and he was appealing to the crowd.

Q. Was he speaking over a loud speaker?

A. No, sir.

Q. How could he be heard if there was a mob shouting?

A. He couldn't be heard very well except by those people right around him.

Q. How close was he to the first rank of the crowd?

A. Right up against them.

Q. Did the crowd pay any attention to him.

A. They were listening to him, because they had to move back."

* *

Colonel Birdsong, based upon his 30 years of military experience and experience with law enforcement background, clearly showed the immaturity, nervousness and lack of training of the personnel as he stated (Birdsong's deposition, pages 73-75, and 76):

"Q. What, if anything, did you see during the night, starting at 8:00 o'clock, I guess, or any time be-

fore—any time, make it general—that would indicate to you, if it did, that the marshals were unseasoned or unskilled?

A. Well, in the very beginning it was self-evident that they were untrained or that they had not worked together enough, because they were highly nervous, and this first occasion that I had to see, that they would take off their helmets and don their masks. That was just one occasion that I saw. Now, of course there is a lot of things that the men know about and I don't.

Q. I only want what you know about it.

A. I understand that, sir.

Q. What was it that made you believe they were nervous?

A. It was self-evident. You could see it.

Q. What time was this?

A. This was practically from the time they arrived on the campus.

Q. Even though the crowd was not unruly and was not throwing anything at them, they were nervous?

A. Yes, sir.

Q. And what were they doing?

A. Well, you could just see that—

Q. What did they do?

A. Nothing except the expression of their faces. That's about all I can tell you.

Q. You mean you determined from the expression on their faces that they were nervous right from the beginning?

A. That's right.

Q. What else did you see to indicate to you—you made also a statement that they had not worked together. What indicated that to you?

A. It didn't seem that they were a team to me.

Q. How did that manifest itself?

A. Well, it was a kind of disjoined affair there. They didn't work as a team." (pages 73-75)

* * *

"A. I was present, but I didn't actually see it. In other words, I saw the gas propelled, I saw it fired. I saw it fired on a level instead of elevating it, but at the moment I didn't know who it had hit, except that I saw it fired into the backs of the patrolmen." (page 76)

* * *

In this condition precipitated by the marshals, it is important to know exactly what happened to the Appellee.

From the deposition of Cyril T. Faneca, Jr., we find:

"A Then, sir, a barrage of gas was fired, which caught us completely by surprise, and we were not expecting anything of this nature. And I grabbed Miss Skeen and—

Q. Pulled out?

A. No. As I said, I was toward the front, and I had no warning that there was going to be any barrage of gas fired, and the first thing I could think of, there was this tree about six feet behind us, and I pushed Miss Skeen behind the tree, and we ducked to avoid these projectiles which were whistling past our heads fired from these gas guns." (page 41)

* * *

"Q. And the fact that the men put on their gas masks didn't give you any clue, didn't give you a warning, that they were going to fire?

A. No, sir. I had no idea that any gas was going to be fired. I did not think the situation was serious enough to warrant any action of this type. That was my personal opinion, sir. Therefore I did not leave with my date. I stayed there.

Q. At that time you didn't know if any men had been injured by any flying pipes, Coke bottles or—" (page 43)

* * *

"A. I did not see it.

Q. You did not know anything about it?

A. I did not see and did not know. That is correct.

Q. And your testimony is that this all took place when it was still light and it was dusk?

A. Yes, sir.

Q. What did you do then? You pushed the girl behind the tree to get her out of the way?

A. Yes, sir, to avoid these missiles.

Q. Then did you leave?

A. Yes, sir, I grabbed her and we ran to the 'Y' Building through all the gas. The grove was saturated with gas. Ran to the 'Y' Building and immediately washed out our eyes and removed our contact lenses." (pages 43-44)

* * *

"Q. How long after the tear gas was fired was it before you arrived at the U. M. C. A.?

A. We ran immediately to the 'Y'.

Q. So it was just a matter of a few minutes?

A. Matter of a minute.

Q. Before you got there and washed your eyes?

A. Yes, sir.

Q. Well, the headache and nausea didn't occur at this time, did it.

A. At this time, sir, I was quite upset and excited, and I don't recall the nausea at this particular time, no, sir.

Q. You were concerned about the safety of the girl?

A. I was concerned about the safety of the girl and of getting out of trouble." (page 44)

* * *

"A. Then we left the 'Y' Building and we walked—

Q. The 'Y' is that building directly across the grove from the Lyceum, is it?

A. Yes, sir.

Q. And you walked where?

A. We walked, our destination was the Student Union Building. We were heading—

Q. —I guess I'd better get over there with you. Why was it you went to the 'Y'?

A. We went to the 'Y' because it was the closest building where we could get the water to wash our eyes, which were severely irritated, and she had contact lenses on which were causing even more irritation.

Q. Why did you not go to Peabody Hall?

A. To go to Peabody we would have had to go parallel to the gas.

Q. You were escaping the gas.

A. That was the primary objective, to get away from the gas and get our eyes washed out.

Q. In order to get to this Student Union—

A. Peabody is a classroom.

Mr. Cates: A classroom, and everything is closed. This is Sunday.

Mr. Eardley: Thank you, Mr. Cates—I know you are being helpful.

Mr. Cates: The U.M.C.A. Building is open 24 hours a day.

Q. If you were to go directly to the Student Union, you would have to go back in the gas filled area, wouldn't you? University Avenue would take you right back where them marshals were firing?

A. Allow me to show you exactly what I did. I took Miss Skeen, and we went in front of the Fine Arts Building—

Q. —Let's mark this line. This is the seven o'clock line. We'll mark this one 'seven'.

A. I took Miss Skeen and we went over to this side as far as possible.

Q. You didn't go on any established road? You cut through?

A. That's correct. Cut through between buildings.

Q. So you escaped the gas area?

A. Yes, sir. To escape the gas area, we went between Peabody and Fulton Chapel, which is here (indicating). We swung wide around and came out over here.

Mr. Cates: Behind what building?

A. This is the Commerce Building. We came up between.

Q. You went behind Peabody?

A. Went behind Peabody, yes sir, we came out over here.

Q. You came out behind the Lyceum?

A. We came out diagonally from the Lyceum.

Q. Were there Federal marshals around the building on that corner where you came out?

A. I don't recall. At the time, as I said, we were walking up toward the Student Union Center. Miss Skeen was quite upset and was crying, as you could well imagine, a considerable amount. We were walking along—we were intending to walk along here (indicating), so when we got to this point—

Q. Let's mark that point. That is very important. This point you have marked with a number of circles is right on the northwest corner of Commerce—

Mr. Cates: —Building, which is known as Conner Hall.

Q. All right. What happened at that point?

A. At that point, about six or eight marshals broke from the ranks over here at the Lyceum, somewhere in this vicinity here.

Q. Let's mark that because this is very important to your lawyer. Mark it right here with three parallel lines. (Witness marks)

Q. And this is on the northwest—

A. —Northwest corner of the Lyceum.

Q. There were a group of marshals—

A. —All shoulder to shoulder.

Q. And when they saw you, they broke ranks?

A. That's correct.

Q. And ran toward you and the girl?

A. And ran toward me, the girl and myself.

Q. And then what happened?

A. She had been crying, and when she turned and she caught them out of the corner of her eye, to the side coming toward us, she almost went hysterical she became so upset, and was trying to run, trying to get me to run with her to escape these people.

Q. You mean they were trying to catch you?

A. Well, from all indications. They were running. There was no one around us. Just the girl and I.

Q. Well, they ran toward you? Is that it?

A. That is correct.

Q. How far away from you were they when they started running?

A. I don't know how far away they were when they started running.

Q. Was it a hundred yards?

A. No, sir, it wasn't that far. As you can see, the Lyceum Building is right here. (indicating)

Q. You tell me, I don't know that area. Is it 50 yards?

Mr. Eardley: . . . Mr. Cates has been scaling it off, and I heard him mutter 'a hundred'. Is that what it is, from the Lyceum to the place where he was standing?

Mr. Cates: To Conner Hall, yes, sir.

Q. What did you do when you saw these fellows start running toward you?

A. Sir, my immediate reaction was to freeze, and I was trying to and so was Miss Skeen. I didn't want to run. I felt that there was no need for me to be running.

Q. You hadn't done anything wrong?

A. I had done nothing wrong.

Q. You didn't throw anything?

A. I had thrown nothing. I realized—I assumed they were running toward us; there was no one around us. As they were approaching us, I yelled at them and said, 'Don't shoot. We don't want any gas over here,' or something to the effect, 'There's just a girl and myself and we are not doing any harm.' Of course, I was upset at the time. I was yelling.

Q. Were you using any profanity?

A. No, sir, I did not use any profanity. I was in the presence of Miss Skeen.

Q. Were you both very close together?

A. Yes, sir, we were very close together. I was holding Miss Skeen. As I said, she was almost hysterical, and I was trying to keep—trying to keep her from just darting off wildly in the condition she was in.

Q. You shouted at them, 'Please don't shoot'?

A. Yes, sir.

Q. And you were both standing together when you did that?

A. Yes, sir, we were.

Q. And there were no other people present other than the marshals?

A. No, sir.

Q. Was there a lot of noise and confusion and shouting?

A. No, sir, there was not. There was no one around in my near vicinity.

Q. And this event took place how many minutes after the first tear gas had been fired in front of the Lyceum?

A. Five or ten minutes.

Q. And you asked them not to shoot, and did they shoot?

A. Yes, sir, they did.

Q. What did they shoot?

A. They fired with gas guns.

Q. How far away from you were they when they fired?

A. I would say, roughly, ten yards.

Q. Just ten yards?

A. Yes, sir.

Q. Did the gas explode in front of your feet?

A. Yes, sir, it exploded at our feet.

Q. What did you do then? Did you run?

A. Sir, at that time I was even more shocked that they were doing this. I mean, it was hard to realize that this was happening.

Q. I didn't ask you that. What did you do?

A. I stepped back a few feet to back off from the gas.

Q. From the gas?

A. From the gas, which as I said, caused temporary blindness, and yelled at them to use their common sense and not to fire at us, and we were doing nothing.

Q. That is your language as you best remember, 'Use your common sense'?

A. 'Use your common sense'.

Q. How many projectiles, or whatever it was—grenades—how many were fired, as you remember?

A. I recall two being fired.

Q. Did they both land in front of you and Miss Skeen?

A. They both landed close to us. I don't recall whether it was exactly in front or to the side, but it would have been a few feet.

Q. You shouted, 'Use your common sense,' and then did you leave?

A. Yes, sir.

Q. And you went to the Student Union?

A. No, sir. At that time the most important thing after this act was to get off the campus. I thought that if the conditions were such that you couldn't even walk along there, we had best get off the campus completely." (pages 45-52)

* * *

III

We respectfully submit in conclusion that the above facts as recited from the depositions in this law suit, clearly show that it was a case falling completely within the limits as set forth in the *Kelley* case, *supra*. We therefore re-

spectfully suggest that there is a conflict between the United States Court of Appeals for the First Circuit and the United States Court of Appeals for the Fifth Circuit and for this additional reason writ of certiorari should be directed to the United States Court of Appeals for the Fifth Circuit for a full and complete hearing in this matter.

Respectfully submitted this the 20th day of April, 1965.

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